Supreme Court, U.S.
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No. 94-

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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MILLARD MCKINNEY,
*Petitioner*,
v.
OSCEOLA COUNTY BOARD OF COUNTY COMMISSIONERS,
*Respondent*.

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**Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does a public employee who has a state-created property interest in continued employment state a claim under the substantive component of the Due Process Clause of the Fourteenth Amendment if the employee is terminated for reasons that are arbitrary and capricious, regardless of whether or not the procedures that are made available to the employee are constitutionally adequate?

2. (a) If a public employee with a state-created property interest in continued employment is terminated by the governing body of the political entity that employed him, in a situation in which it was feasible to hold a pretermination hearing, and the hearing that in fact was held failed to satisfy constitutionally mandated procedural requirements, does the employee state a claim under the procedural component of the Due Process Clause of the Fourteenth Amendment, notwithstanding the availability of a constitutionally adequate postdeprivation remedy in state court?

(b) Is a postdeprivation action in state court a constitutionally "adequate" remedy for a public employee who was deprived of a state-created property interest in continued employment following a constitutionally inadequate hearing, if the state court is limited to a review of the record developed in the constitutionally inadequate predeprivation hearing?

## PARTIES

In addition to respondent Osceola County Board of County Commissioners, the case caption in the United States Court of Appeals for the Eleventh Circuit listed John Pate and Jack Shannin as defendants-appellees. Pate was listed individually and in his official capacity as Commissioner of the Osceola County Board of County Commisisoners, and Shannin was listed individually and in his official capacity as Development Department Director of Osceola County. As part of a joint stipulation by the parties in the United States District Court for the Middle District of Florida, both Pate and Shannin were voluntarily dismissed. Petitioner Millard McKinney was the sole plaintiff-appellant in the courts below.

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner Millard McKinney respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit *en banc* in *McKinney v. Pate*, 20 F.3d 1550 (May 5, 1994).

## OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 20 F.3d 1550, and is reproduced in Appendix A (1a-32a). The order of the Eleventh Circuit vacating the panel opinion and ordering rehearing *en banc* is reported at 994 F.2d 772, and is reproduced in Appendix B (33a-34a). The vacated opinion of the Eleventh Circuit panel that initially heard the appeal is reported at 985 F.2d 1502, and is reproduced in Appendix C (35a-62a). The opinion of the United States District Court for the Middle District

of Florida, dated April 8, 1991, setting aside the jury verdict in favor of petitioner, is unreported and is reproduced in Appendix D (63a-67a). The order of the district court, dated February 4, 1991, granting in part and denying in part defendants' motion for summary judgment, is unreported and is reproduced in Appendix E (68a-73a).

## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit *en banc* was entered on May 5, 1994. A timely petition for rehearing was denied on June 30, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, section 1, provides in relevant part as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

## STATEMENT OF THE CASE

### A. Statement of Facts [1]

On July 27, 1987, petitioner Millard McKinney was hired by respondent Osceola County (Florida) Board of County Commissioners ("Board") as the Osceola County Building Official. R2-31.[2] In this position, McKinney headed the Building Division, which was one of three divisions of the County's Development Department. McKinney's immediate supervisor was Jack Shannin, Director of the Development Department. Shannin reported

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[1] Because the appeal in this case was from the district court's entry of judgment notwithstanding the jury's verdict for McKinney, the evidence presented to the jury is set forth in the light most favorable to McKinney.

[2] Citations are to the district court record, as certified to the Eleventh Circuit.

to the County Administrator, Eleanor Anderson, who was directly responsible to the Board. R2-39-40.

Upon assuming his position as Building Official, McKinney began to address certain long-standing problems in the Building Division. R2-40-51, 61-69. Among these problems was lax enforcement of the building codes, which had resulted in numerous code violations. R2-113-15. Under McKinney's direction, the building codes were more rigorously enforced. R2-115; R3-300-01.

After successfully completing his probationary period, McKinney became a permanent employee of Osceola County. As stated in the May 9, 1988, performance evaluation that McKinney received from Shannin:

> Your performance to date has been excellent. When that is combined with the understanding of the job it guarantees your inclusion in the full time permanent status.

Pl. Exh. 4. As a permanent employee, McKinney could, under the Osceola County Policy Manual, "be dismissed only for cause as outlined in the Code of Conduct and Disciplinary Procedures and this policy . . . ." Pl. Exh. 2, p. 28.

On July 27, 1988, McKinney received another highly favorable performance evaluation from Shannin. He was rated as "exceptional" in most of the fifteen performance categories, and not lower than "satisfactory" in any of them. Pl. Exh. 4. At this time, McKinney also was given a merit increase in salary. *Id.*

In November 1988, three new members were elected to the five-member Board. One of these new members was John Pate, a former employee of the Building Division who unsuccessfully had sought to become the Osceola County Building Official, the position held by McKinney. R3-291-92. At the time that he was elected to the Board, and while serving as a Board member, Pate was employed in the construction industry.

Prior to his election, Pate on several occasions had come into conflict with McKinney regarding enforcement of the building codes in connection with construction projects in which Pate was involved. R2-115-23. Pate had, for example, protested to McKinney about what he considered to be the Building Division's overly strict application of the code requirement that "fire blocks" be installed in drywall construction. R2-116-20. While serving as a member of the Board, Pate continued to pressure McKinney "on a daily basis," on behalf of various developers and homeowners, to overlook violations of the building codes. R2-124-29. Pate's efforts in this regard were enhanced by the fact that he was the Commissioner who served as liaison between the Board and the Development Department, which included the Building Division that was headed by McKinney. R2-123-24; R3-252-53. McKinney consistently refused to comply with Pate's requests that building code violations be overlooked. R2-115-29.

Several weeks after the November 1988 election, the newly constituted Board met with County Administrator Anderson and discussed complaints that the Commissioners had received from developers about McKinney. R3-277. Based upon the discussion that took place at that meeting, and the "instructions" that she received from Pate at the conclusion of the meeting, Anderson understood the Board's position to be that "McKinney had to go." R3-272-73, 279. Anderson explained the situation to Shannin, and told him "to take care of the problem because if he did not [she] would." R3-277, 295.

Shannin thereupon asked McKinney to resign, informing McKinney that he would otherwise be discharged. R2-130-31. When McKinney asked what the basis for the discharge would be, Shannin responded: "I don't have anything. But I'll get something." R2-132. The bottom line, as Shannin put it, was that "the commissioners wanted [McKinney] out of the job." *Id.* McKinney refused to resign, and he reiterated that refusal in

response to a renewed request by Shannin in mid-December. R2-132-37.

In early January, 1989, McKinney was abruptly suspended and presented with a document entitled "Notice of Reasons for Proposed Termination of Millard McKinney." Pl. Exh. 5; R2-138-39. The thrust of the charges in this document was that McKinney had failed to provide adequate direction to the Building Division and that the Division was as a result operating in an incompetent and inefficient manner. The notice had been prepared by Shannin—who in May and July 1988 had given McKinney excellent performance evaluations, Pl. Exh. 4, and who personally was opposed to terminating his employment, R3-299-300—in response to Anderson's instruction "to get a list of charges against McKinney," because she "wanted to make sure that McKinney was terminated in the proper way." R3-299.

Shortly thereafter, the Board conducted an evidentiary hearing, pursuant to the Osceola County Policy Manual, to consider the charges against McKinney and to decide whether to terminate his employment. Def. Exh. 1.[3] Although McKinney assumed that Pate probably would be biased against him, he had no reason to believe at the time of the hearing that the other commissioners would not be impartial. R2-193-94; R3-242-45. McKinney participated fully in the hearing and attempted to refute the charges against him. R2-193; *see* R2-139-91. At the conclusion of the hearing, the Board adopted an order

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[3] Because McKinney was treated as a "department head," the applicable procedure under the Policy Manual was to conduct the evidentiary hearing prior to, rather than after, his termination. Pl. Exh. 2, pp. 28-30. The County's "normal" termination procedure, applicable to other permanent employees, was to provide the employee with notice and an opportunity to respond in an informal conference with the employee's department head; following termination, the employee would be entitled to a full evidentiary hearing before the county's Personnel Board. *Id.*

sustaining all of the charges against McKinney and terminating his employment. Def. Exh. 2.

**B. Disposition in the Courts Below**

1. On October 11, 1989, McKinney filed the instant action in the United States District Court for the Middle District of Florida, basing jurisdiction on 28 U.S.C. § 1331. McKinney styled the first count in his complaint as "Substantive Due Process," alleging that his rights under the substantive component of the Due Process Clause were violated because the Board's stated reasons for terminating his employment were pretextual, arbitrary, and without any rational basis in fact. R1-1-3-10.[4] Specifically, it was McKinney's position that he had not been terminated because of incompetent and inefficient performance as stated in the charges against him and in the Board's termination order, but rather because of his insistence on enforcing the building codes despite attempts by politically connected contractors to obtain special treatment. McKinney alleged that he was, therefore, terminated for reasons that were arbitrary and capricious. R1-26-1-4. Prior to trial, the parties stipulated that McKinney had a state-created property interest in his continued employment as Building Official, R1-26-9, and that the actions of Pate and Shannin with respect to McKinney's termination constituted the official expression of Osceola County custom and policy, R1-31.

At the conclusion of a three-day jury trial, the jury was asked to render a verdict by responding to the following two special interrogatories:

> 1. Was there substantial evidence that the plaintiff was fired because of incompetent or inefficient performance of the duties of his office?

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[4] Count II of the complaint alleged a pendent state-law claim, upon which the district court granted summary judgment for defendants. R1-24, App. 70a-73a. That count is no longer at issue.

2. Was the plaintiff fired because of political or personal animosity because of plaintiff's enforcement of the building codes?

R1-41. Accepting McKinney's theory of the case, the jury answered the first interrogatory in the negative and the second in the affirmative. *Id.* The jury awarded McKinney damages in the amount of $145,000. *Id.*

On April 8, 1991, in response to the Board's motion for judgment notwithstanding the verdict, the district court overturned the jury's verdict and entered judgment in favor of the Board. R1-47, 48, App. 63a-67a. In its brief opinion, the court held that "[i]n view of the conflicting evidence and the lack of proof of impartiality [sic] of the judges/commissioners, the jury was compelled to find that the action taken by the Board of Commissioners was not arbitrary, capricious and pretextual." App. 67a.

2. On appeal, a panel of the Eleventh Circuit reversed and ordered that the jury verdict in favor of McKinney be reinstated. It was "well settled," the court noted, that claims like McKinney's "state 'a substantive due process violation—deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis.' " App. 41a (quoting *Hearn v. City of Gainesville,* 688 F.2d 1328, 1332 (11th Cir. 1982)). The court found that there was "substantial evidence to support [McKinney's] claim," App. 39a, opining that "[w]hile there were certainly disputed points, the evidence was clearly such that reasonable people could reach different conclusions as to what had occurred." App. 44a. That being the case, the court held that "the issue is appropriately resolved by a jury and the judge is not free to substitute his or her opinion for that of the jury." *Id.*

The panel's decision to reverse was unanimous. In a separate concurring opinion, however, Chief Judge Tjoflat

(joined by Judge Cox) indicated that, while the result was compelled by Eleventh Circuit precedent, he believed that precedent to be erroneous and thought it should be reviewed by the court *en banc*. App. 45a-62a. Subsequently, the Eleventh Circuit ordered rehearing *en banc* and vacated the panel opinion. App. 33a-34a.

3. Upon rehearing *en banc*, the Eleventh Circuit overruled circuit precedent and affirmed the district court's judgment in favor of the Board. App. 1a-32a. The court's *en banc* opinion was authored by Chief Judge Tjoflat, and it adopted essentially the same reasoning that Judge Tjoflat had espoused in his earlier concurring opinion as a member of the panel.

The court drew a sharp line between "procedural" and "substantive" due process, declaring that the latter only "protects those rights that are 'fundamental.'" App. 7a. Quoting Justice Powell's concurring opinion in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 229 (1985), for the proposition that "'substantive due process rights are created only by the Constitution,'" App. 8a-9a, the court concluded that "areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause . . . ." App. 8a. Accordingly, the court rejected existing Eleventh Circuit precedent, under which:

> [a] violation of a public employee's right to substantive due process occurs when an employer deprives the employee of a property interest for an improper motive and by means that [are] pretextual, arbitrary and capricious, regardless of whether or not a hearing was held.

App. 13a (quoting *Nolin v. Douglas County*, 903 F.2d 1546, 1553-54 (11th Cir. 1990)). Rather, said the

court, "only *procedural* issues are implicated" by such claims. App. 14a (emphasis in original).[5]

On the basis of the foregoing reasoning, the court concluded that "McKinney's state-created property right is [not] deserving of substantive due process protection," App. 18a, but must be analyzed "in terms of procedural due process considerations." App. 19a.[6] For purposes of this analysis, the court summarized McKinney's claim as follows:

> McKinney does not deny that the County followed a *facially* adequate procedure; in fact, but for his allegations of bias, McKinney acknowledges that there were no failures of process. McKinney's only contentions are that the facially adequate procedure was biased against him and that the Board was preordained to find against him, regardless of the evidence. On its face, then, McKinney's allegation is procedural: the County failed to provide one of the elements of procedural due process—an unbiased decisionmaker.

App. 18a (emphasis in original).

The classification of a claim as involving "procedural" rather than "substantive" due process is important, the

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[5] According to the court, the procedural due process inquiry should include a "limited substantive review" into "whether the action taken is supported by substantial evidence." App. 12a n.13 (quoting *Holley v. Seminole County School Dist.*, 755 F.2d 1492, 1496 (11th Cir. 1985)). This inquiry, said the court, "assures that there is 'substantial evidence' for the decision and, thus, 'a rational basis for the deprivation of an individual's property.'" *Id.* (quoting *Holley*, 755 F.2d at 1499). The court thought this "an appropriate, essentially procedural, review of the sufficiency of the evidence," *id.*; it took issue only with the label of "substantive due process" that had been affixed to it. *Id.*

[6] The court noted that while McKinney had styled Count I of his complaint "Substantive Due Process," it would "examine McKinney's cause of action for what it actually is, not for what McKinney would have it be"; it therefore gave "no weight" to McKinney's denomination of his claim in the complaint. App. 17a.

court explained, because "unlike substantive due process violations, procedural due process violations do not become complete 'unless and until the state refuses to provide due process.'" App. 21a (quoting *Zinermon v. Burch*, 494 U.S. 113, 126 (1990)). The court then cited *Parratt v. Taylor*, 451 U.S. 527 (1981), and its progeny, construing those cases as holding that "due process [does] not require pre-deprivation hearings where the holding of such a hearing would be impracticable, that is, where the deprivation is the result of either a negligent or an intentional deprivation of property." App. 22a.

It was in light of these principles of procedural due process that the Eleventh Circuit turned to McKinney's claim. Here, said the court, "any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners . . . ." *Id.* Relying on what it termed the "unambiguous" "precedent established by *Parratt*," *id.*, the court held that

> even if McKinney suffered a procedural *deprivation* at the hands of a biased Board at his termination hearing, he has not suffered a *violation* of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation.

*Id.* (emphasis in original).

Noting that McKinney had "failed to take advantage of any state remedies" for the deprivation of his property interest, *id.*, the court examined the "adequacy" of the remedy that was available to him under Florida law. Rejecting McKinney's contention that a state-court action was an inadequate remedy because the reviewing court was limited to the record developed before the Board, the Eleventh Circuit found that remedy "adequate." App. 23a-24a. Thus, the court concluded that, "[e]ven if McKinney's bias allegations are true, the presence of a satisfactory state remedy mandates that we find that no

procedural due process violation occurred." App. 24a-25a.

## REASONS FOR GRANTING THE WRIT

This Petition for a Writ of Certiorari challenges three positions that have been taken by the Eleventh Circuit with regard to the application of the Due Process Clause of the Fourteenth Amendment to the termination of a public employee who has a state-created property interest in continued employment. We demonstrate below why each of the challenged positions raises an important question of federal law that warrants review by this Court. Before doing so, however, it is helpful to establish a context by discussing briefly the relationship among the Questions Presented, and more specifically by indicating which of the questions it will be necessary for this Court to decide, and in what sequence, in order to dispose of the instant case.

The opinion of the Eleventh Circuit is bottomed on its threshold conclusion that the deprivation of a public employee's state-created property interest in continued employment *never* can provide the basis for a claim under the substantive component of the Due Process Clause. If this Court disagrees, and finds that an employee who alleges that he was terminated for reasons that are arbitrary and capricious does state a substantive due process claim (Question Presented No. 1), the jury verdict in McKinney's favor must be reinstated, and it will be unnecessary to reach Questions Presented 2(a) and 2(b), which relate to the procedural component of the Due Process Clause. (The position of the Eleventh Circuit with regard to substantive due process is addressed in Part I.)

If, on the other hand, this Court agrees with the Eleventh Circuit that McKinney's claim raises only procedural issues, it then must decide whether the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (1981), and its progeny applies

to the facts of the instant case. If this Court rejects the Eleventh Circuit's reading of *Parratt*, and concludes that McKinney can pursue his procedural due process claim regardless of whether the post-termination remedy available to him in state court was constitutionally adequate, the inquiry need go no further. McKinney's allegation that the Board was biased would state a claim under the procedural component of the Due Process Clause. (The position of the Eleventh Circuit with regard to *Parratt v. Taylor* is addressed in Part II(A).)

Question Presented 2(b) is whether the post-termination remedy that was avaliable to McKinney in state court was constitutionally adequate, and more specifically whether the Eleventh Circuit was correct when it answered this question in the affirmative despite the fact that the Florida court to which McKinney could have turned would have been limited to a review of the record developed in the constitutionally inadequate hearing before the Board. It will be necessary for this Court to reach this question only if it concludes that McKinney's claim implicates procedural—and not substantive—due process issues, and that his procedural due process claim is subject to the rule of *Parratt v. Taylor*. (The position of the Eleventh Circuit with regard to the adequacy of the state-court remedy available to McKinney is addressed in Part II(B).)

## I. SUBSTANTIVE DUE PROCESS

This Court long has recognized that "[t]he touchstone of due process is freedom from arbitrary governmental action." *Ponte v. Real*, 471 U.S. 491, 495 (1985); *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 559 (1956). Applying this principle to "property" interests, this Court has stated that "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408

U.S. 564, 577 (1972). Accordingly, the Court has recognized in a number of cases that the deprivation of a state-created property interest for arbitrary and capricious reasons violates the substantive component of the Due Process Clause of the Fourteenth Amendment.

For example, in considering the substantive due process claim of a terminated public school teacher who had a state-created property interest in her continued employment, this Court explained that the plaintiff's burden was to show "that there is no rational connection between the Board's action and its conceded interest in providing its students with competent, well-trained teachers." *Harrah Indep. School Dist. v. Martin*, 440 U.S. 194, 198 (1979) (per curiam). Similarly, in *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985), this Court framed the substantive due process inquiry as "whether the record compels the conclusion that the University acted arbitrarily in dropping Ewing" from the university program in which he had been enrolled.[7]

While these cases reflect the Court's position that the Due Process Clause affords "substantive" protection against the deprivation of state-created property interests for arbitrary and capricious reasons, individual Justices have on occasion expressed a contrary view. Thus, in his concurring opinion in *Ewing*, Justice Powell asserted that,

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[7] The Eleventh Circuit's *en banc* opinion in this case attempts to distinguish *Harrah* on the ground that what was at issue there was a "legislative" rather than an "executive" act, App. 9a-10a n.9, but that characterization of *Harrah* does not survive scrutiny. The Court in *Harrah* described as follows the school board's action at issue in the case: "Finding [Martin's] persistent noncompliance with the continuing-education requirement 'wilful neglect of duty,' the Board voted at its April 1974 meeting not to renew her contract for the following school year." 440 U.S. at 196. It is difficult to see how that action differs in any meaningful respect from the Board's decision to terminate McKinney in the instant case. And the executive/legislative distinction cannot in any event explain this Court's analysis in *Ewing*.

> [w]hile property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), *substantive due process rights are created only by the Constitution.*

474 U.S. at 229 (emphasis added). Although Justice Powell spoke only for himself, and cited no supporting authority, this dictum—and the acknowledged fact that substantive due process does indeed protect "fundamental" constitutional rights[8]—have caused a divergence of opinion among the federal courts of appeals with regard to the point at issue in the instant case.

Seven of the federal circuits squarely have decided the question of whether public employees are protected by the substantive component of the Due Process Clause against the deprivation of a state-created property interest in continued employment for reasons that are arbitrary and capricious. Of these, four circuits have held that substantive due process *does* confer such protection, two have held that it *does not*, and one circuit has spoken equally squarely in both directions. Virtually all of the remaining circuits have had something to say about the matter,

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[8] There is no question that one important function of substantive due process is to protect "fundamental" rights. *E.g.*, *Palko v. Connecticut*, 302 U.S. 319 (1937). But the proposition that substantive due process protects *only* fundamental rights—as the Eleventh Circuit suggests, *see* App. 7a-9a, 18a—does not follow and has no support in this Court's cases. As one commentator has observed:

> [S]ubstantive due process review is both more differentiated and pervasive than is ordinarily recognized. The "fundamental rights" jurisprudence of cases such as *Roe v. Wade* represents only the tip of the iceberg. In its commonest form, substantive due process doctrine reflects the simple but far-reaching principle . . . that government cannot be arbitrary.

Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 310 (1993).

albeit without finding it necessary actually to decide the question.

The First, Second, Fifth, and Eighth Circuits have recognized the substantive due process right at issue. In the context of resolving a question of qualified immunity, the First Circuit has held that, as of 1982, a public employee had a "clearly established substantive due process right to be free from arbitrary and capricious decisions affecting her employment status." *Newman v. Massachusetts*, 884 F.2d 19, 24 (1st Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990). The court added that its recognition of that right as of 1982 was (in 1989) "still viable law today." *Id.* at 25. The Second Circuit has reached the same conclusion, holding that, as a matter of substantive due process, a public employer's "actions impairing [a property interest in continued employment must] have a rational relation to a proper governmental purpose." *Gargiul v. Tompkins*, 704 F.2d 661, 668 (2d Cir. 1983), *vacated on other grounds*, 465 U.S. 1016 (1984). The Fifth Circuit likewise has held, in *Schaper v. City of Huntsville*, 813 F.2d 709, 716-17 (5th Cir. 1987), that a public employee with a state-created property interest in continued employment is protected against deprivation of that interest by the requirements of substantive, as well as procedural, due process. Similarly, the Eighth Circuit (in deciding a qualified immunity question) concluded that a tenured faculty member at a public university "has a substantive due process right to be free from discharge for reasons that are 'arbitrary and capricious,' or in other words, for reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact." *Morris v. Clifford*, 903 F.2d 574, 576-77 (8th Cir. 1990).[9]

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[9] The Fifth and the Eighth Circuits have held that the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981), should be applied to substantive as well as procedural due process claims, at least in this context, so as not to permit litigants to "eviscerate" *Parratt* by the expedient of characterizing their claims as resting on substantive

In addition to the Eleventh Circuit in the *en banc* decision in this case, *see* App. 7a-9a, the Seventh Circuit has taken the position that no such substantive due process right exists. Acknowledging the analysis applied by this Court in *Harrah* and *Ewing*, *supra*, the Seventh Circuit, in *Kauth v. Hartford Ins. Co.*, 852 F.2d 951, 956-58 (7th Cir. 1988), nonetheless believed that recognizing a substantive due process claim in these circumstances would undermine the integrity of *Parratt v. Taylor*, 451 U.S. 527 (1981). The court's solution was to reject the existence of a substantive due process right altogether.[10]

The Sixth Circuit's jurisprudence contains cases deciding the question in both directions. In *Sutton v. Cleveland Board of Education*, 958 F.2d 1339, 1350-51 (6th Cir. 1992), the Sixth Circuit, much like the Eleventh Circuit in the instant case, relied on Justice Powell's dictum in *Ewing* for its conclusion that only "fundamental" interests are protected by substantive due process, and that a statutory right to be terminated only for cause was not such a fundamental interest. On the other hand, earlier Sixth Circuit cases—which *Sutton* did not purport to overrule—have recognized substantive due process protection for public employees against arbitrary and capricious decisions depriving them of an interest in continued employment. *See Gutzwiller v. Fenik*, 860 F.2d 1317, 1328-29 (6th Cir. 1988); *Johnston-Taylor v. Gannon*, 907 F.2d 1577, 1582 (6th Cir. 1990), *cert. denied*, 113 S. Ct. 1583 (1993).

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rather than procedural due process. *Schaper*, 813 F.2d at 717-18; *Weimer v. Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989). After *Zinermon v. Burch*, 494 U.S. 113 (1990), however, this no longer appears to be a valid position, inasmuch as *Zinermon* made clear that a substantive due process claim "is complete when the wrongful action is taken," and that a plaintiff with such a claim therefore "may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights." *Id.* at 125.

[10] The court's concern with *Parratt* was similar to that of the Fifth and Eighth Circuits. *See supra* note 9.

Nearly all of the remaining circuits, while finding it unnecessary to decide the question, nonetheless have discussed it. And this discussion likewise reflects a diversity of opinion. *See San Filippo v. Bongiovanni*, 961 F.2d 1125, 1138-39 (3d Cir.) (citing cases from other circuits applying substantive due process to arbitrary dismissals of public employees), *cert. denied*, 113 S. Ct. 305 (1992); *Huang v. Board of Governors of Univ. of North Carolina*, 902 F.2d 1134, 1142 n.10 (4th Cir. 1990) (suggesting in dicta that a state-created property interest cannot form the basis for a substantive due process claim); *Lum v. Jensen*, 876 F.2d 1385, 1387-89 (9th Cir. 1989) (holding, for purposes of qualified immunity analysis, that substantive due process protection against arbitrary discharge from public employment was not "clearly established" in the Ninth Circuit as of 1984), *cert. denied*, 493 U.S. 1057 (1990); *Archuleta v. Colorado Dep't of Institutions*, 936 F.2d 483, 489 n.6 (10th Cir. 1991) (assuming, without holding, that a property interest in continued employment is protected by substantive due process); *see also Committee of U.S. Citizens v. Reagan*, 859 F.2d 929, 943-44 (D.C. Cir. 1988) (substantive due process prevents governmental action that is "legally irrational [in that] it is not sufficiently keyed to any legitimate state interests").[11]

We need not belabor the point. The Eleventh Circuit not only is wrong, but its *en banc* opinion adds to the

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[11] The conflict among the federal circuits is mirrored in decisions of the state appellate courts. Again, the majority of the state courts that have decided the question have recognized the existence of the substantive due process right at issue here. *See, e.g., Givan v. City of Colorado Springs*, 876 P.2d 27 (Colo. Ct. App. 1993), *cert. granted* (Colo. June 20, 1994); *Pace v. Hymas*, 726 P.2d 693, 698 (Idaho 1986); *Chronopoulos v. University of Minnesota*, 1994 Minn. App. LEXIS 781, *24-25 (Minn. Ct. App. Aug. 16, 1994); *Hamilton v. Board of Trustees of Oconee County School Dist.*, 319 S.E.2d 717, 721 (S.C. Ct. App. 1984). *Contra Scott v. Board of Comm'rs*, 785 P.2d 221, 223-24 (N.M. 1989); *Haskins v. City of Chattanooga*, 877 S.W.2d 267 (Tenn. Ct. App. 1993).

confusion among the courts of appeals as to whether a public employee with a state-created property interest in continued employment states a claim under the substantive component of the Due Process Clause if he is discharged for arbitrary and capricious reasons. The grant of a writ of certiorari would allow this Court to settle this important question of federal law.

## II. PROCEDURAL DUE PROCESS

### A. The Applicability of *Parratt v. Taylor*

Assuming, *arguendo*, that McKinney's complaint does not raise substantive due process issues, the next question is whether McKinney states a claim under the procedural component of the Due Process Clause. It scarcely warrants extended discussion to demonstrate that McKinney's hearing before the Board did not satisfy constitutionally mandated due process minima. As the Eleventh Circuit acknowledges, "[i]t is axiomatic that, in general, the Constitution requires that the state provide . . . an impartial decisionmaker before infringing on a person's interest in . . . property," App. 19a, and in the procedural posture of this case McKinney's allegation that he was deprived of his state-created property interest in continued employment by a biased Board must be accepted as true.

But this is not the end of the matter. Whether the Board's bias means that McKinney suffered a violation of his procedural due process rights depends on whether this case comes within the ambit of *Parratt v. Taylor*, 451 U.S. 527 (1981), in which this Court held that the availability of a constitutionally adequate postdeprivation remedy in state court satisfies the demands of procedural due process where the deprivation complained of was caused by "random and unauthorized" conduct. The Eleventh Circuit concluded that the circumstances envisioned by *Parratt* were present here; we submit that the court misapplied the teaching of that case and its progeny.

In *Zinermon v. Burch*, 494 U.S. 113 (1990), this Court attempted to clarify how its holding in *Parratt* should be applied in analyzing procedural due process claims.[12] In explaining its grant of certiorari in *Zinermon*, this Court observed that "[s]everal Courts of Appeals have found *Parratt* inapplicable where the defendant state officials had the state-clothed authority to effect a deprivation and had the power to provide the plaintiff with a hearing before they did so," whereas "[o]ther Courts of Appeals have held that *Parratt* applies even to deprivations effected by the very state officials charged with providing predeprivation process." *Id.* at 116 n.2 (citing cases). This Court resolved the dispute in favor of the former position, holding that:

> petitioners cannot characterize their conduct as "unauthorized" in the sense the term is used in *Parratt* and *Hudson* [*v. Palmer*, 468 U.S. 517 (1984)]. The State delegated to them the power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement.

*Id.* at 138.

Narrowing even further the reach of *Parratt*, the *Zinermon* Court observed that "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Id.* at 132.

*Zinermon* would appear to be dispositive of the *Parratt* issue in the instant case. To begin with, McKinney was deprived of his property interest in continued employment by the Board of County Commissioners, which, under the Osceola County Policy Manual, had "the power and au-

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[12] *Zinermon* made clear that *Parratt* has no application to substantive due process claims. 494 U.S. at 125; *see supra* note 9.

thority to effect the very deprivation complained of here," as well as "the concomitant duty to initiate the procedural safeguards," 494 U.S. at 138, established by the Policy Manual to guard against an unlawful deprivation. Nor were the Board members simply county employees to whom these duties had been delegated; they constituted rather the governing body of the political jurisdiction that employed McKinney. And, a predeprivation hearing was of course "feasible" here, inasmuch as a hearing in fact was held before McKinney's employment was terminated.[13]

A grant of certiorari is warranted in the instant case not simply because the Eleventh Circuit misread the teaching of *Parratt*, as amplified by *Zinermon*, but also because other courts of appeals have struggled with the application of those precedents. Thus, the Fourth Circuit has held that the conduct of state employees is not "unauthorized" within the meaning of *Parratt* when the state has delegated to those employees the authority to effect the deprivation in question, as well as the duty to initiate the procedural safeguards provided for by state law. *Plumer v. Maryland*, 915 F.2d 927, 931 (4th Cir. 1990). On the other hand, the Seventh Circuit has

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[13] The procedural flaw, as the Eleventh Circuit noted, was not the failure to provide a hearing at all, but rather the failure to satisfy the constitutional requirement to provide a hearing before an impartial decisionmaker. App. 18a.

Of course, a full evidentiary hearing before an impartial decisionmaker is not invariably required prior to termination of a public employee. Where the employer provides pretermination notice and an opportunity to respond, together with the opportunity for a constitutionally adequate post-termination hearing, the requirements of due process are satisfied. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Because McKinney was treated as a department head, however, he was afforded an evidentiary hearing by his employer *only* at the pretermination stage and had no entitlement to any post-termination process from his employer. *See supra* note 3. *Loudermill* therefore has no application to this case. *See, e.g., Swank v. Smart*, 898 F.2d 1247, 1256 (7th Cir.), *cert. denied*, 498 U.S. 853 (1990).

opined that even the acts of policymaking officials may be "unauthorized" if they deviate from an established procedure. *Easter House v. Felder*, 910 F.2d 1387, 1400-05 (7th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1067 (1991). Similarly, for the Fifth Circuit, "§ 1983 should not be employed to remedy deprivations which occur at the hands of even high ranking state employees 'who [are] acting in direct contravention of the state's established policies and procedures which have been designed to guarantee the very protections which the employee now has chosen to ignore.'" *Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318, 322 (5th Cir. 1994) (quoting *Easter House*, 910 F.2d at 1404). And, in the instant case, the Eleventh Circuit held that *Parratt* was applicable because "any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners." App. 22a.[14]

There likewise is a conflict among the federal circuits with regard to the question of whether the feasibility of providing a predeprivation hearing is dispositive of the

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[14] It appears to follow from the Eleventh Circuit's holding—that *Parratt* is applicable here because "any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners," App. 22a—that the court believes *Parratt* to apply in *all* cases not covered by the holding of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (*Parratt* inapplicable when the facial adequacy of an "established state procedure" is challenged). This Court's cases do not support that view, particularly after *Zinermon*. Nonetheless, the Eleventh Circuit is not the only court to have flirted with the notion that *Logan* constitutes the only exception to the rule of *Parratt*. For example, the analysis of the Seventh Circuit in *Easter House*, *supra*, appears to reflect such a view, *see* esp. 910 F.2d at 1400-05; *see also id.* at 1411 (Cudahy, J., dissenting), and the Fifth Circuit has followed the Seventh in this regard. *Johnson*, 18 F.3d at 322. Thus, from one perspective, the *Parratt* issue presented by this case is whether a litigant is necessarily subject to the rule of *Parratt* if his claim is to have been deprived of property by governmental action contrary to, rather than consistent with, "established state procedure."

*Parratt* issue. Four circuits have held *Zinermon* to require that "[w]hen a government can provide a predeprivation hearing, the availability of a postdeprivation tort remedy does not satisfy the Due Process Clause." *Matthias v. Bingley*, 906 F.2d 1047, 1057, *modified*, 915 F.2d 946 (5th Cir. 1990); *Plumer*, 915 F.2d at 931; *Gentry v. City of Lee's Summit*, 10 F.3d 1340, 1344-45 (8th Cir. 1993); *Mackey v. Dyke*, 29 F.3d 1086, 1093 (6th Cir. 1994). On the other hand, the Eleventh Circuit in this case has deemed a predeprivation hearing to be "impracticable" whenever "the deprivation is the result of either a negligent or an intentional deprivation of property." App. 22a. Similarly, the principle that the feasibility of a predeprivation hearing is dispositive has been glossed over by the Seventh Circuit in *Easter House, supra*, and by the First Circuit in *Lowe v. Scott*, 959 F.2d 323, 340-44 (1st Cir. 1992).

In short, the Eleventh Circuit was off the mark when it stated in the *en banc* opinion that "[t]he precedent established by *Parratt* is unambiguous." App. 22a. Further guidance from this Court is warranted.

**B. The Adequacy of McKinney's State-Court Remedy**

If this Court concludes both that this case raises only procedural due process issues and that the doctrine of *Parratt* applies, disposition of the case will turn on the constitutional "adequacy" of the state-court remedy available to McKinney.

McKinney's remedy under Florida law was to file with the circuit court a petition for a common-law writ of certiorari, seeking a review of the Board's action pursuant to Fla. R. App. P. 9.030(c)(3). *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 625-26 (Fla. 1982); *Education Dev. Ctr., Inc. v. City of West Palm Beach Zoning Bd. of Appeals*, 541 So. 2d 106, 108 (Fla. 1989). While the circuit court's jurisdiction under these circumstances is mandatory rather than discretionary, *Cherokee Crushed*

*Stone, Inc. v. City of Miramar*, 421 So. 2d 684, 689 (Fla. Dist. Ct. App. 1982), and while the court is to determine, *inter alia*, "whether procedural due process is accorded," *Deerfield Beach*, 419 So. 2d at 626, the court is limited in making this determination to the record developed at the Board hearing. *Ragland v. State*, 46 So. 724, 725-26 (Fla. 1908); *cf.* Fla. Stat. § 120.68(4) (judicial review under Florida Administrative Procedure Act confined to the record); *Arlotta v. Florida Parole & Probation Comm'n*, 419 So. 2d 1159, 1160 (Fla. Dist. Ct. App. 1982) (same).[15]

This Court has not addressed the question of whether a post-termination state-court remedy that requires the employee to make his case solely on the basis of the evidence that he was allowed to present during an admittedly constitutionally inadequate pretermination hearing comports with the requirements of procedural due process. Because this is in its own right an important question of due process law, and because it is in addition integrally related to the application of *Parratt*, this Court should determine whether the post-termination remedy that was available to McKinney in the Florida state courts was constitutionally adequate.

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[15] Although the Eleventh Circuit disagreed with "McKinney's conclusion that Florida's process is inadequate," App. 23a, it did not specifically dispute his assertion that "the Florida courts' power to review is limited to the record before the Board." *Id.* The authorities cited in text confirm this limitation.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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